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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1398

KLENNA ANN FLETCHER,
Petitioner,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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INDEX

Jurisdiction 1

Questions Presented 2

Statement of the Case and Facts 4

Argument 7

No Basis for Certiorari Jurisdiction 7

Right of Privacy on Publication—Federal Law 9

Florida Law 11

Petitioner Cannot Claim Damages for Publication About Another 12

Damages for Publication—Trespass—Consent by Common Custom and Usage 13

Conclusion 15

Table of Authorities

CASES

Cantrell v. *Forest City Publishing Company*, 419 U.S. 245 (1974) 14, 15

Cox v. *Cohn*, 420 U.S. 469 (1975) 11, 12

Dietemann v. *Time*, 449 F.2d 249 (CA-9, 1971) 2

Fletcher v. *Florida Publishing Company*, (Fla. 1976) 340 So.2d 914; 319 So.2d 100 (Fla. DCA-1, 1975); 40 Fla.Supp. 1 (C.C. Fla. 1974) 1, 3, 4, 5, 13

Gertz v. *Welch*, 418 U.S. 323 (1974) 11

Jacova v. *Southern Radio*, 83 So.2d 34 (Fla. 1955) 1, 11

McKee v. *Gratz*, 262 U.S. 127 (1922) 12, 13

Martin v. *Struthers*, 319 U.S. 141 (1943) 12, 13

Paul v. *Davis*, 424 U.S. 693 (1976) 2

Prior v. *White*, 132 Fla. 1, 180 So. 347 (1938) 2, 13

Time v. *Hill*, 385 U.S. 274 (1967) 1, 9, 10, 12

TEXTS AND STATUTES

52 Am.Jur.2d, Trespass, Sec. 39 13
87 C.J.S., Trespass, Sec. 49b 13
Conley on Torts (4th Edition) Secs. 251 and 248 13
Harper and James on Torts, Sec. 1.11 13
Restatement of Law of Torts, Sec. 167(d), Trespass, p. 403 13
Supreme Court Rule 23.1(f) 4, 8
28 U.S.C. 1257(3) 1, 7
42 U.S.C. 1983 2

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JURISDICTION

Petitioner (Plaintiff) has filed Petition for Certiorari to review the opinion of the Supreme Court of Florida reported at 340 So.2d 914 (Petitioner's A-38). Hereinafter we refer to pages in Petitioner's Appendix as A-.....

While Petitioner cites 28 U.S.C. 1257(3), we are mystified as to the basis on which she asserts jurisdiction in this Court. The Florida Court held that under *both* Federal law [*Time* v. *Hill*, 385 U.S. 274 (1967)] and Florida law [*Jacova* v. *Southern Radio*, 83 So.2d 34 (Fla. 1955)], there was no invasion of privacy for an accurate account of a matter of public interest (here an admitted fair account of death and investigation of suspected arson and murder); and that there was no trespass under the facts here where there was implied consent to entry under common custom and usage.

The decision is correct on adequate non federal grounds.

Even a cursory study of Petitioner's complaint (A-53) and the opinions, shows that Petitioner neither raised nor preserved, nor did the Court decide or pass upon, her alleged Constitutional questions.

We shall refer to Petitioner sometimes as Plaintiff; to the Respondent on occasion as Defendant.

QUESTIONS PRESENTED

We cannot follow Petitioner's Questions. Questions (B) and (D) rely on 42 U.S.C. 1983 (civil rights), whereas at no time until now has that statute even been *mentioned*—let alone *relied on*. There is no reference to that statute as such in the pleadings or opinions. Plaintiff did not mention *or refer to* 42 U.S.C. 1983 in her complaint (A-53).[1] Questions (A), (C) and (E) require restatement.

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1. *Dietemann* v. *Time*, 449 F.2d 249 (CA-9, 1971) is cited by the intermediate Florida Court at A-28. But there is *no discussion* of 42 U.S.C. 1983, and the Federal Court expressly states "We do *not reach* that issue." And in *Dietemann*, there was entry by subterfuge and deceit and clandestine electronic recording without consent. What happened in *Dietemann* has been compared to Watergate.

But here, as held in *Prior* v. *White*, 132 Fla. 1, 180 So. 347 (1938):

> "Permission to come upon one's premises may be implied from custom, usage or conduct."

And the Court here held that the defendant's entry was peaceful, unopposed, and authorized by such common custom, usage and conduct. See also *Paul* v. *Davis*, 424 U.S. 693 (1976) holding no action *under* 42 U.S.C. 1983 for publication (even where libelous—and here the publication, including the photograph, was admittedly accurate).

We think Petitioner's five questions might properly be re-stated as follows:

(1) Is there an invasion of privacy of plaintiff by defendant when defendant published a fair and accurate account of a matter of admitted public interest and concern (death and investigation of suspected arson and murder)?

(2) Is there trespass (or invasion of privacy by trespass so that *damages for publication* may be had) when defendant media representatives entered the premises under the factual situation as set out by the Supreme Court of Florida, 340 So.2d 914, at 915-916 (A-39):

> "The fire and police departments were called by a neighbor who discovered the fire, but too late to save the child. A large group of firemen, news media representatives, and onlookers gathered at the scene and on Mrs. Fletcher's property.
>
> "When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice. The media representatives entered through the open door; there was no objection to their entry; they entered quietly and peaceably; they did no damage to the property; and their entry was for the purpose of their news coverage of this fire and death.
>
> "The Fire Marshal desired a clear picture of the 'silhouette' left on the floor after the removal of Cindy's body. He and Sergeant Short in their depositions explained that the picture was important for their respective investigations to show that the body was already on the floor *before* the heat of the fire did any damage in the room. The Fire Marshal took

one polaroid picture of the silhouette, but it was not too clear, he had no further film, and he requested photographer Cranford to take the 'silhouette' picture which was made a part of the official investigation file of both the Fire and Police.

"This picture was not only part of the investigation but News Photographer Cranford turned it and his other pictures over to the defendant newspaper. It and several other pictures appeared in the news story of The Florida Times-Union on September 16, 1972."

(3) Did Petitioner timely and properly raise and preserve her alleged Federal questions so as to give this Court jurisdiction to review on certiorari? [See Supreme Court Rule 23.1(f)].

STATEMENT OF THE CASE AND FACTS

Petitioner has filed neither the record in the court below nor [as suggested by Supreme Court Rule 23.1(f)] an Appendix setting up the facts with appropriate support. We respectfully suggest that the fundamental and accurate facts are those set up in the summary judgment entered by the trial court (40 Fla.Supp. 1—A-14, et seq.) and summarized by the Florida Supreme Court (340 So.2d 914, at 915-916, et seq. above—A-38 et seq.).

What we have here is a case where Petitioner sued for *damages* for invasion of privacy by *publication*. When confronted with the fundamental law that there can be no invasion of privacy on publication of a fair and accurate account of a matter of public interest, plaintiff sought the same *damages* for *publication*, but on the added theory of *trespass*. She thus tried to get by indirection what she could not get directly, i.e., damages for publication.

To this latter contention, the Florida Supreme Court held (340 So.2d at 917—A-43) "that consent is an absolute defense to an action for trespass and that the defense of custom and usage is but another way of expressing consent by implication"; that there was no genuine issue of material fact as to such consent by custom and usage here; and upheld summary judgment for the defendant.

As stated by the trial court (40 Fla.Supp. 1—A-7-9):

"Not only did the Fire Marshal and Detective Sergeant Short testify it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had been permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin.

"Similar affidavits have been filed from the Chicago Tribune; the ABC-TV News New York; the Tallahassee Democrat; the Pensacola Journal; the Associated Press; the President of the American Newspaper Publishers Association; the Miami Herald; United Press International; the Florida Times-Union and Jacksonville Journal; the Washington Post; TV-12 at Jacksonville; TV-10 at Miami; TV-4 at Jacksonville; the New York Daily News; the Milwaukee Journal; the Birmingham Post-Herald; the Memphis Commercial-Appeal; the Macon Telegraph; and the Tampa Tribune; all attesting that it is *common usage, custom and practice for news media to enter private premises and homes under circumstances like those here.*" (Italics here and elsewhere added by us unless otherwise indicated).

* * *

"In Mrs. Fletcher's deposition, she stated she was in New York at the time of the fire; there was no one at the scene who objected to the entry; and she makes it clear she does not contend there was any force used for entry, or any physical damage done to the premises.

"Plaintiff likewise concedes that it was perfectly proper for the Fire and Police to enter without permission. The Fire and Police used the picture as part of their official investigation and actually requested that such picture be taken and would have made such request even had the Plaintiff been there and objected. There is no evidence that any restriction was placed upon the Defendant's photographer in the use of the photographs he took at the request of the Police and Fire Marshal.

"Numerous affidavits, as above set forth, have been filed by the Defendant in support of its motion for summary judgment. All these affidavits attest to the fact that it is common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event. The court therefore finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice. The court further finds that the entry complained of in Count I of the Plaintiff's complaint was one permitted by common usage, custom and practice, and that the Defendant is entitled to a summary judgment as a matter of law as to matters alleged in Count I of the Plaintiff's complaint."

ARGUMENT

Petitioner has approximately two pages in support of jurisdiction here. We shall first advert to the jurisdictional question.

No Basis for Certiorari Jurisdiction

We fail to see where either in those two pages, or elsewhere in her petition, Petitioner has shown any basis for certiorari jurisdiction in this Court under 28 U.S.C. 1257(3), the pertinent portion of which is italicized:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*"

The opinion of the Supreme Court of Florida, attempted to be reviewed by certiorari, was not based primarily on Constitutional grounds, nor did it mention the Constitutional provisions or the civil rights statute set up by Petitioner.

To the contrary, the Supreme Court of Florida cited *Florida* law and non federal grounds to support adequately its ruling that

(1) There was no invasion of privacy on a fair and accurate publication on a matter of public interest; and

(2) Peaceful unopposed entry by the news media without objection, without damage, to cover a matter of

public interest, at the invitation of public officers investigating arson and murder, was, under the facts here, not trespass, for it was under common custom and usage.

As stated at 340 So.2d 918 (A-44):

> "The District Court erred in reversing summary judgment for petitioner as to Count I. The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursuant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*"

There is no basis for certiorari jurisdiction. Just because a decision passed upon a matter of wide public interest is no basis for certiorari jurisdiction in the United States Supreme Court. This is true even though a decision to the *contrary* of the results reached here would run afoul of defendant's Constitutional guarantees. The Florida Supreme Court decision has adequate non federal grounds—Florida and general law—to support it. Petitioner to the contrary notwithstanding, the Florida Supreme Court has not decided any substantial Federal questions contrary to Petitioner's Constitutional rights.

Supreme Court Rule 23.1(f) provides:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the *stage in the proceedings* in the court of first instance and in the appellate court, at which, and the manner in which, *the federal questions sought to be reviewed*

> *were raised;* the *method* of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the *way in which they were passed upon by the court;* such pertinent *quotations of specific portions of the record,* or summary thereof, with specific reference to the *places in the record* where the matter appears (e.g., ruling on *exception,* portion of the *court's charge* and *exception* thereto, *assignment of errors*) as *will show that the federal question was timely and properly raised so as to give this court jurisdiction* to review the judgment on writ of certiorari." (Italics added by us.)

We respectfully submit that Petitioner did not properly raise below her alleged Federal questions. In her "Statement of the Case", Petitioner has not followed the rules of this Court to demonstrate her attempt to so raise such questions. As stated, a cursory reading of her complaint (A-53) and the opinions below demonstrates that Petitioner has not timely and properly raised the Federal questions so as to give this Court jurisdiction on certiorari.

Right of Privacy on Publication—Federal Law

In *Time* v. *Hill* [385 U.S. 274 (1967)], this Court expressly held at 388 and 389 (even as to an alleged *false* statement):

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which *exposes persons to public view, both private citizens* and public officials. *Exposure of the self to others in varying degrees is a concomitant of life*

in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. '*Freedom of discussion,* if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v Alabama, 310 US 88, 102, 84 L ed 1093, 1102, 60 S Ct 736. 'No suggestion can be found in the Constitution that the *freedom there guaranteed for speech and the press* bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' Bridges v California, 314 US 252, 269, 86 L ed 192, 206, 62 S Ct 190, 159 ALR 1346. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, *is a matter of public interest.* 'The line between the informing and the entertaining is too elusive for the protection of . . . [*freedom of the press*].' Winters v New York, 333 US 507, 510, 92 L ed 840, 847, 68 S Ct 665. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '. . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . . .' New York Times Co. v Sullivan, supra, 376 US at 271-272, 11 L ed 2d at 701, 95 ALR2d 1412. As James Madison said, 'Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.' "

Here we had an accurate and fair statement on a matter which everyone agreed was a matter of public interest—much more than, as in *Time,* "the opening of

a new play". Here, a 17-year-old was dead in a fire, and the authorities suspected and investigated arson and murder.

We quote from *Cox* v. *Cohn,* 420 U.S. 469 (1975) at 492:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he *relies necessarily upon the press* to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of the government,* and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press,* most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." (Here, a government investigation of fire, arson and murder.)

Florida Law

Under Florida law [and under *Gertz* v. *Welch,* 418 U.S. 323 (1974), the states can *add* to the protection given the news media when the right of the people to know be concerned] defendant was likewise free of liability to plaintiff here. We quote from *Jacova* v. *Southern Radio,* (Fla. 1955) 83 So.2d 34, at 36:

> "And it is true that it is settled law in this state—as in other states in which an action for invasion of privacy is recognized—that as to these fields the right of privacy does not necessarily protect a person against the publication of his name or photograph in

connection with the dissemination of legitimate news items or other matters of public interest. Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 168 ALR 430; Id. 159 Fla. 31, 30 So.2d 635. Or, as stated by some courts, 'Where one, *whether willingly or not, becomes an actor in an occurrence of public or general interest,* he emerges from his seclusion, and it is not an invasion of his "right of privacy" to publish his photograph with an account of such occurrence'."

Florida law, under common custom and usage, infra, shows there was no trespass. Florida law, under privacy, above, shows there was no invasion of privacy.

So, irrespective of Federal law, Florida law provided an adequate basis for the decision of the Florida Supreme Court.

It is true that the *First Amendment, Time, Cox, McKee, Martin* and other Federal cases, infra, would have *required* the same result.

Nonetheless, the decision has adequate support under Florida law.

Petitioner Cannot Claim Damages for Publication About Another

Here the primary claim for damages for invasion of privacy is the publication of the silhouette photograph of the body of plaintiff's deceased daughter (A-1).

As held by the trial court (40 Fla.Supp. 1—A-4), and never seriously questioned:

> "Also, it is settled that one cannot recover for the alleged invasion of privacy of a deceased person, no matter how close the relationship of the deceased to the one seeking damages. See *Cordell* v. *Detective*

> *Publications* (CA-6, 1969) 419 F.2d 989; 32 Fla.Jur., Torts, Sec. 10, 1973 Supplement; and *Young* v. *The Week That Was* (CA-6, 1970) 423 F.2d 265."

Damages for Publication—Trespass—Consent by Common Custom and Usage

Petitioner tried to make out a right to recover damages for publication of an *accurate* story on a matter of *public* interest, by claiming *trespass*.

As pointed out by the Florida Supreme Court (340 So.2d at 917—A-43) "consent is an absolute defense to trespass" and the defense of custom and usage "is but another way of expressing consent."

The District Court states (A-43):

> "We do not here hold that a trespass or 'intrusion' did in fact occur * * * We simply hold such is alleged * * * and the proofs * * * are insufficient to resolve the point by summary judgment."

The Florida Supreme Court reversed and affirmed summary judgment entered by the trial court. We have, therefore, at *most* a Florida procedural point as to when, under state law, summary judgment is proper.

The law is too well settled to require argument that "consent is an absolute defense to trespass" and that "consent may be implied by common custom, usage and practice". See 52 Am.Jur.2d, Trespass, Sec. 39; 87 C.J.S., Trespass, Sec. 49b; Conley on Torts (4th Edition) Secs. 251 and 248; Harper and James on Torts, Sec. 1.11; Restatement of the Law of Torts, Sec. 167(d), Trespass, page 403; *Prior* v. *White,* 132 Fla. 1, at 19, 180 So. 347 (1938); *Martin* v. *Struthers,* 319 U.S. 141, 149 (1943); and *McKee* v. *Gratz,* 262 U.S. 127 (1922) (cited by the trial court at 40 Fla.Supp. 1—A-5-6).

The result would be the same without the invitation of the police officers. The vital element is peaceful, unopposed entry, without physical damage, under common custom and usage, for the coverage of a matter of real public interest and concern about which the public has a right to know.

In *Cantrell* v. *Forest City Publishing Company*, 419 U.S. 245 (1974), the photographer, as here, was *in the house* without permission. The widow owner was away, just as here. He took many pictures in the house. His pictures were accurate—were *not* false light invasion of privacy—and a judgment in his favor (overturning jury verdict against the photographer) was upheld by this Court.

As stated by the trial court below (A-7):

"In paragraph 12 of her complaint (in *Cantrell*), a copy of which has been furnished the court, Plaintiff alleged 'an unwarranted trespass' on her property without her consent, and in 'in deliberate and scornful disregard of the rights of plaintiffs to security of their persons, family and home and their precious right of privacy'. There, as here, trespass was relied on as a basis for claiming damages for the publication.

"There is no force used in the entry and no physical damage to the property. The *publication* complained of (not the picture) was a feature story which in the words of the court, 'placed the Cantrell family in a bad light because of its inaccuracies and untruths'. * * *

"In *Cantrell*, the court ruled that the 'judgment of what is newsworthy must remain primarily the function of the publisher', that there was no basis

to hold there was 'no newsworthiness', and that in the absence of 'calculated falsehood' [See *St. Amant* v. *Thompson* (1968) 390 U.S. 728, 733] judgment must be entered for defendant photographer (on the accurate photographs) although the Court upheld the judgment against the defendant publisher on the 'false light' stories with their 'calculated falsehoods'."

This Court in *Cantrell* thus made a distinction between damages for *false* publication, and *no* damages for fair and accurate photographs, even where the photographer entered the home peacefully but without the express consent of the absent owner.

CONCLUSION

It is clear that there is no basis for the Court to grant certiorari here.

Far from *plaintiff's* Constitutional rights being invaded, a decision *contrary* to that below would invade the First Amendment guarantees of freedom of press and speech, and of the right of the public to know about matters of public interest and concern.

There can be no invasion of privacy on an accurate publication of a matter of public interest.

There can be no trespass by the news media when the entry is peaceful, without objection, on the invitation of public officers investigating arson and murder, to cover such newsworthy matters, and is under common custom, usage and practice.

Finally, Petitioner neither raised nor preserved, and the Florida court did not pass upon, her alleged Constitutional points.

The Florida decision rests on adequate non federal grounds.

Respectfully submitted,

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